Petition

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NO. _____

Supreme Court of the United States

OCTOBER TERM, 1981

ENSERCH EXPLORATION, INC., and
CONTINENTAL OIL COMPANY,
Petitioners

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents

On Writ of Certiorari to the Court of Civil Appeals For the Third Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the Texas franchise tax, as applied to these Petitioners' sales of natural gas in interstate commerce, invalid under the Supremacy Clause because as so applied it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the Natural Gas Act?

II

Is the Texas franchise tax regulation, which treats as "business done in Texas" the gross receipts from all sales of gas made in Texas regardless of whether the sales are in interstate or intrastate commerce, invalid because it is not fairly apportioned and, therefore, violative of the Commerce Clause?

Are Petitioners denied equal protection of the laws as guaranteed by the Fourteenth Amendment because of the fact that the gross receipts from their sales of gas in interstate commerce are treated as "business done in Texas" when sales by competing firms in interstate commerce are not so treated for Texas franchise tax purposes?

LIST OF PARTIES

Enserch Exploration, Inc., Petitioner[1]

Continental Oil Company, Petitioner[2]

South Texas Natural Gas Gathering Company, a participant in all state court litigation as Plaintiff in the trial court, Appellee in the Court of Civil Appeals, and Petitioner in the Supreme Court of Texas.

Bob Bullock, Comptroller of Public Accounts for the State of Texas, Respondent

John Hill, Attorney General of the State of Texas, named as a Defendant at the time of the filing of the original suit.

Mark White, the present Attorney General of the State of Texas.

Jesse James, Treasurer of the State of Texas, named as a Defendant at the time the original suit was filed.

Warren Harding, the present Treasurer of the State of Texas.

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1. Affiliates and subsidiaries (other than wholly owned) are Thermex Energy Corporation; Pool Arabia, Ltd.; PoolWood Production Services (U.K.) Limited; Pool Santana, Limited; Ebasco CTCI Corporation, Ebasco Arabia Limited; Ebanal, S.A. de C.V.; Allied Oilfield Services Limited; Oiltools de Espana; Antah Oiltools Sdn. Bhd.; FischerOiltools Inc.; Solus Sdn. Bhd.; Solus Schall Ltd.; and Ocean Systems Espanola, S.A.

2. Continental Oil Company has recently been acquired by Du Pont, and the list of affiliates and subsidiaries was not available until late December but will be sent under separate cover.

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OPINIONS BELOW

The judgment sought to be reviewed is that of the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The opinion is reported at 614 S.W.2d 215, and it and the accompanying court order are reproduced in the Appendix hereto as Item 1.

Application for writ of error to the Supreme Court of Texas was refused with a finding of no reversible error. The order was not officially reported but is reproduced as Item 2 in the Appendix. That ruling became final by the court's order denying motion for rehearing which is reproduced as Appendix Item 3.

The trial court ruled for Petitioners. Its judgment and findings of fact and conclusions of law are reproduced as Item 4 and Item 5, respectively, in the Appendix.

JURISDICTION

The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas was entered on April 1, 1981, but did not become final because applications for writ of error were filed in the Supreme Court of Texas. That court's refusal of the applications for writ of error became final when motions for rehearing were overruled on September 23, 1981. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3).[3]

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3. The circumstances described above make proper appeal from the Court of Civil Appeals. *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the Constitution of the United States:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article I, Section 8, of the Constitution of the United States:

> "The Congress shall have Power . . . To regulate Commerce . . . among the several States."

Constitution of the United States, Amendment Number Fourteen, Section 1:

> "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Natural Gas Act, 15 U.S.C. §§ 717(b) and (c), 717a(7), 717c(a), (d) and (e), 717d(a), and 717f(b) and (c)(1)(A):

Included in the Appendix as Item 6.

Article 12.02, Taxation-General, Title 122A of the Revised Civil Statutes of the State of Texas, in pertinent part (the full text is included in the Appendix as Item 7):

"1) (a) Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business.

"(b) For the purpose of this Article, the term 'gross receipts from its business done in Texas' shall include:

(i) Sales of tangible personal property when the property is delivered or shipped to a purchaser within this State, regardless of the F.O.B. point or other conditions of the sale, reduced by the deduction, if applicable, allowable under Subsection (c) of this Section (1);

(ii) Services performed within Texas;

(iii) Rentals from property situated, and royalties from the use of patents or copyrights, within Texas, and

(iv) All other business receipts within Texas. . . .

"(d) For the purpose of this Article, the term 'total gross receipts of the corporation from its entire business' shall include all of the proceeds of all sales of the corporation's tangible personal property, all receipts from services, all rentals, all royalties and all other business receipts, whether within or outside of Texas. . . ."

Rule .026.02.12.013 ("Rule 13") of the Comptroller of Public Accounts of the State of Texas, Section (c)(1) and (3):

"(c) Transactions not resulting in Texas gross receipts.

"(1) Revenue from ticket sales in Texas for air travel to foreign countries or other states does not constitute Texas receipts. . . .

"(3) The sale of oil, goods or merchandise delivered to a third party carrier for delivery outside the State of Texas does not constitute business done in Texas, regardless of F.O.B. destination, unless it is established that the oil, goods or merchandise were delivered to a purchaser in Texas."

STATEMENT OF THE CASE

The decision on which review is sought was entered on appeal from a trial court judgment rendered in three suits originally separately filed but later consolidated for trial. Each of the suits was instituted to recover franchise taxes paid under protest as a result of deficiency determinations for past years made by the Comptroller of Public Accounts. Among the grounds on which Petitioners, two of the plaintiffs below, relied were violations of provisions of the Constitution of the United States which form the basis of the questions here presented. That the issues were raised and ruled upon in favor of Petitioners in the court of first instance is established by the trial court's Conclusions of Law 5-8 and 15, which read (Appendix, Item 5, pp. A21-A23):

"5. All of the natural gas the subject of Plaintiffs' sales was dedicated to interstate commerce.

"6. All of Plaintiffs' sales were in interstate commerce.

"7. The assessment of the taxes paid by Plaintiffs constitutes an impermissible burden on interstate

> commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States.
>
> "8. The assessment of the taxes paid by Plaintiffs constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and violates the supremacy clause of the Constitution of the United States. . . .
>
> "15. The classification of the gross receipts from Plaintiffs' sales as 'business done in Texas' under the circumstances of these consolidated cases denies to Plaintiffs equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States."

Despite the fact that Respondents as Appellants in the Court of Civil Appeals presented a specific point of error attacking the trial court's conclusion of denial of equal protection, the Court of Civil Appeals opinion contains no reference to the issue or to the constitutional provision. In the Supreme Court of Texas Respondents did not deny the raising of the issue; they merely conceded that the Court of Civil Appeals "did not address any equal protection argument" (Response, 31). In reversing the trial court judgment for Petitioners, the Court of Civil Appeals ruled against Petitioners on the other federal questions (Appendix, Item 1, pp. A7-A10).

Pursuant to agreement of all parties, the case was submitted to the trial court entirely on stipulated facts. Petitioners are engaged in the business of producing and selling natural gas. The gas is produced from wells dedicated by contract to interstate commerce and regulated under the Natural Gas Act by the Federal Energy Regulatory Commission (FERC). The gas is sold at the well-

head or at the tailgate of processing plants directly to interstate pipeline companies for delivery and resale outside the State of Texas. There is a continuous and uninterrupted movement of the gas from the wellhead to the pipeline companies and to ultimate consumers in other states. The gas may not be diverted from contract destination without express approval of the FERC. All aspects of the sales, including the establishment of prices or rates, are subject to the jurisdiction of the FERC.

The basic issue in the case is whether gross receipts from Petitioners' above described sales of gas in interstate commerce should be treated, in computing their franchise taxes, as "gross receipts from business done in Texas." Although there have been several amendments to the controlling statute, the quoted phrase has been used in the Texas franchise tax formula for more than a half a century (Acts 1930, 41st Leg., 5th C.S., Ch. 68, p. 220). The last change in phraseology of the here pertinent provisions occurred in 1969 (Acts 1969, 61st Leg., 2nd C.S., Ch. 1, p. 61). Throughout the entire period from 1930 until 1975, gross receipts from sales of gas in interstate commerce were treated as "gross receipts of the corporation from its entire business" but not "gross receipts from business done in Texas." Thus, the receipts from sales of gas in interstate commerce were included in the denominator but not in the numerator of the apportionment formula.[4] That treatment was approved by the courts in *Clark v. Atlantic Pipe Line Co.*, 134 S.W.2d 322 (Tex. Civ. App., Austin, 1939, writ

4. The formula is set out in Article 12.02, Taxation-General and consists of multiplying the taxable capital of the corporation by a fraction, the numerator of which is "business done in Texas" and the denominator of which is "gross receipts of the corporation from its entire business."

ref'd), and *Flowers v. Pan American Refining Corporation,* 154 S.W.2d 982 (Tex. Civ. App., Austin, 1941, writ ref'd); the Office of the Attorney General of Texas reached the same conclusion on two occasions, Opinion No. WW-1503 (1962) and Opinion No. M-289 (1971); and the Comptroller so ruled by letter ruling dated August 4, 1971, which was widely disseminated to all producers including Petitioners and was distributed by the Comptroller as an instruction to field office auditors.

The deficiency assessments against Petitioners were based upon an amendment, in 1975, to franchise tax administrative rulings in which the Comptroller reversed the long-standing position of that office to rule that gross receipts from sales of gas into interstate commerce constituted "gross receipts from business done in Texas." Audits of Petitioners' tax reports for the years 1969 through 1975 were conducted and the deficiencies assessed.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I.

THE STATE APPELLATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Contrary to the trial court ruling, the state appellate court has held that (Appendix, Item 1, pp. A9-A10):

> "[The Texas] franchise tax does not violate the Supremacy Clause, U.S. Const. Art. VI, Cl. 2 . . . In

> setting up these regulations [the Natural Gas Act, 15 U.S.C. §§ 717ff.] *Congress clearly intended that the price of natural gas would reflect the reasonable costs of its production and transportation. These costs include the taxes that are reasonably and fairly imposed by a state . . .*" (Emphasis added.)

The statement by the state appellate court that Congress clearly intended that the price of natural gas reflect its reasonable costs of production and transportation completely ignores the issue in this case. If what is "reasonable" may be determined or even influenced by state legislators, independent of the federal agency which was created to regulate and balance the interests of buyers and sellers and which has been clothed with the sole jurisdiction to determine such costs, then the entire Congressional effort is meaningless and the regulatory scheme envisioned by Congress and embodied in the Natural Gas Act is or will be a shambles.

(a) This Court has held that determining pipeline and producer costs is the task of the Federal Energy Regulatory Commission and that a state, in the exercise of its taxing power, may not trespass on the authority of the federal agency.

This Court's recent decision in *State of Maryland v. State of Louisiana*, ____U.S.____, 101 S.Ct. 2114 (1981), is clearly in point. The statute there under consideration was the Louisiana First-Use Tax. It was attacked on a ground identical with one of the bases on which Petitioners here attack the Texas franchise tax as applied to them. This Court pointed out that (101 S.Ct. 2128-2129):

> "On the merits, plaintiffs argue that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of natural gas in interstate commerce. The Supremacy Clause provides that 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect."

The contention was that the tax violated the Natural Gas Act, 15 U.S.C. §§ 717ff. A test to be applied is incorporated in the following general rule (101 S.Ct. 2129):

> "Of course, a state statute is void . . . where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "

That statement of law is the precise ground on which the trial court reached the conclusion that the Texas tax violates the Supremacy Clause (Appendix, Item 5, p. A22). It is also the ground on which this Court held invalid the Louisiana First-Use Tax. This Court explained that the "Gas Act was intended to provide the FPC, now FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce *from wellhead* to delivery to consumers" and that the effect of the Louisiana tax "is to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers" (101 S.Ct. 2130, Emphasis supplied).

As precedent for its holding, this Court cited *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963), noting it had there been held that (101 S.Ct. 2131):

> "[T]he intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States . . . is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority.' Id., at 92, 83 S.Ct., at 651."

The final ruling, that the Louisiana tax stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the Natural Gas Act, reads (101 S.Ct. 2131-2132):

> "Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review . . . Even if the FERC ultimately determined that such expenses should be passed on in toto, this kind of decision-making is within the jurisdiction of the FERC; and the Louisiana statute, like the state commission's order in Northern Natural Gas, supra, is inconsistent with the federal scheme and must give way. At the very least, there is an 'imminent possibility of collision,' id., at 92, 83 S.Ct. at 651. The FERC need not adjust its rulings to accommodate the Louisiana statute. To the contrary, the State may not trespass on the authority of the federal agency. As we see it, plaintiffs are entitled to judgment on the pleadings that § 1303C is invalid under the Supremacy Clause."

The decision here subject to review disregards the rule that the authority of the federal agency over pricing extends from the wellhead to the ultimate consumer and

would have precisely the same effect of (1) interfering with the paramount authority of the FERC to regulate the intricate relationship between cost structures of various purchasers and eventual costs to wholesale customers who sell to consumers in one or more states and (2) interfering with the discretion vested in the FERC to make determinations with regard to how much, if any, of the costs of extraction and transportation may be passed on and to whom.

As shown by the opinion below and established by stipulations, all of the gas here involved was produced from wells dedicated to interstate commerce, subject to the Natural Gas Act and sold in interstate commerce pursuant to Certificates of Public Convenience and Necessity issued by the FERC. All sales were subject to the regulatory power of the FERC. This Court held that the Louisiana tax trespasses on the jurisdiction of the FERC; there is equal basis for holding that the Texas tax, when applied to the instant facts, also trespasses on that jurisdiction. There is no more reason to require the FERC to accommodate the Texas tax than for the FERC to adjust its rulings to accommodate the Louisiana tax. Treating Petitioners' sales of gas into interstate commerce as "gross receipts from business done in Texas" would necessarily, as in the reported case, increase producers' costs and, therefore, trespass on the authority of the federal agency. The state law, as here applied to these Petitioners, should similarly give way.

(b) The federal question is substantial.

The Supremacy Clause is basic to the system of government of this nation. It was included in the Constitution

to resolve potential conflicts between state and federal law. The "framers of our Constitution foresaw this state of things and provided for it by declaring the supremacy not only of itself, but of laws made in pursuance of it," *Gibbons v. Ogden*, 22 U.S. 186 (1824). That case was among those cited in *Free v. Bland*, 369 U.S. 663 (1962), where it was explaind that (369 U.S. 666):

> "The Supreme Court of Texas' interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."

In the case at bar, as in the reported case, the Texas court has assumed to interpret the Supremacy Clause as permitting local law to prevail. Clearly federal interests as set forth in the Natural Gas Act are far greater than, for instance, a Treasury regulation applicable to savings bonds which this Court in the cited case enforced despite the community property provision in the Texas Constitution. There can be no more substantial question than one which arises when a state law, as applied by a state court, interferes with important federal policy as declared by act of Congress and enforced by this Court.

II.

THE STATE APPELLATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION INCONSISTENTLY WITH APPLICABLE DECISIONS OF THIS COURT.

Although the state appellate court recognized the stipulated fact that "[o]nly sales of gas with delivery in Texas to interstate pipeline companies for delivery and resale outside the State of Texas are involved in this cause," it refused to find that a burden was placed on interstate commerce because title to and possession of the gas are transferred within Texas; it disregarded the constitutionally imposed "fair apportionment" requirement to state taxation because the "transactions in question took place entirely within Texas"; and it attempted to create a distinction because of the specific phraseology of the statute involved (Appendix, Item 1, pp. A7-A9). Accordingly, leaving aside the question of conflict between state and federal jurisdiction, discussed above, the tax upheld by the court below is inconsistent with the applicable decisions of this Court dealing with the Commerce Clause of the United States Constitution.

(a) This Court has held that "state taxes levied on a local activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce and that this effect is the proper focus of Commerce Clause inquiry."

The quoted holding was made in *Commonwealth Edison Company v. State of Montana*, ____U.S.____, 101

S.Ct. 2946 (1981). In that opinion it was further pointed out that (101 S.Ct. 2952):

> "The Court has . . . long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity."

That principle should be particularly applicable here in view of the stipulated fact, noted by the court below, that all aspects of the sale of the gas were subject to the regulatory authority of the FERC. The FERC has no regulatory authority over intrastate sales, 15 U.S.C. § 717 (b), but the state appellate court in the decision here subject to review upheld the tax primarily, if not entirely, because the sale of gas (upon which the franchise tax was based) was found to be a "local" transaction.

(b) Even in the absence of conflict between state and federal law, this Court has held that any tax affecting interstate commerce, in order to be valid, must be "fairly apportioned."

The requirement that the tax be "fairly apportioned" is set forth in a number of cases, all of which either expressly or by implication, recognize that if the tax is not "fairly apportioned," there is a possibility of multiple taxation which would create an impermissible burden on interstate commerce. This requirement is the second "prong" of the fourpart test enunciated in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

The leading case exemplifying a tax which was not "fairly apportioned" is *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). That decision in-

volved a gas gathering tax which in effect attempted to tax the same type of transaction here in question. The state court had upheld the gas gathering tax primarily on the basis of its conclusion that the tax fell on a local activity, but this Court explained the controlling principles as follows (347 U.S. 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. . . . And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

The mere possibility of other states' selecting the same "local activity" for taxation was the basis for invalidating the tax. This Court explained that (347 U.S. 170):

> ". . . if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken

> process of interstate commerce in the Congress, not in the States.' "

The possibility of multiple taxation here present is identical with its potential presence in *Michigan-Wisconsin.* Petitioners' gas is sold only for resale in other states. If Texas can treat the gross receipts from the sale of gas as "gross receipts from business done in Texas," any state could impose the same burden on the ultimate or intermediate sale of the same gas in that state.

The holdings quoted above were specifically approved in *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978), where, in distinguishing the tax then under consideration, this Court pointed out that (435 U.S. 479, ftn. 18):

> "Today's decision does not question the Michigan-Wisconsin judgment, because Washington apportions its business and occupation tax to activity within the State. *Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.*" (Emphasis added.)

The *Michigan-Wisconsin* case was again cited with approval both in the *State of Maryland* case and in the *Montana* case, where this Court pointed out, first, that there was no real distinction, in terms of economic effect, between severance taxes and other types of state taxes subject to Commerce Clause scrutiny, and, second, that a state tax is not immunized from Commerce Clause scrutiny merely because the tax is imposed on goods prior to their entry into the stream of interstate commerce.

It should be noted that the parties in the *Montana* case conceded that no fair apportionment issue was present

in that case (101 S.Ct. 2954). The coal which was the subject of suit in the *Montana* case was sold directly to the ultimate consumers, the utility companies which used it in the production of electricity. Thus, a tax on the "severance"—which this Court refused to distinguish from other types of state taxation—could not occur in any other state. There is never to be another sale of the coal. Its initial sale, upon severance, is by the producer to the ultimate consumer and no possibility for multiple taxation exists.

Unlike the *Montana* case, the possibilities of multiple taxation in the instant case are rife, as this Court observed in *Michigan-Wisconsin*. The gas here involved is sold to pipeline companies which are not the ultimate consumers but which resell to distributing companies for further sale to consumers. Each of these sales could be the subject of an additional tax by the state within which transfer of title takes place, since each of these sales has the necessary "local" incidence upon which the court below relied in upholding the tax. The multiple effect of such taxes and the absence of fair apportionment are obvious.

The court below refused to consider fair apportionment, or the possibility of multiple taxation, finding instead that "there can be no claim that the tax is unapportioned. The transactions in question took place entirely within Texas." (Appendix, Item 1, p. A9). So, too, would be the reasoning of each state imposing a tax as the gas made its way from Texas to the ultimate consumer, changing ownership as it went. The reasoning obviously does not protect against multiple taxation where, as here but unlike *Montana*, the ultimate purchaser is not involved in the first sale by Petitioners. As this Court held in *Montana*

(101 S.Ct. 2953), "state taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry."

It is interesting to note that in the case of oil, where pipelines act as carriers only and do not technically take title to the commodity at the wellhead, the Texas Comptroller has acknowledged that unless the "purchaser"—that is, the consumer—purchases the oil in Texas, a sale to a carrier—that is, a pipeline company—for delivery to a purchaser outside Texas does not constitute "business done in Texas." Rule 13(c)(3). The Rule is obviously a recognition of the limitations placed upon taxing authorities by the Commerce Clause and is completely consistent with the *Montana* case.

It is curious that gas should be treated differently from oil merely because different practices in the two competing industries cause carriers to take title to gas but not to oil. As this Court noted in the *Montana* case, approving a statement by the Montana Supreme Court, (101 S.Ct. 2955, ftn. 8), ". . . It would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts."

Be that as it may, because it has been held that oil and coal purchased by ultimate consumers within a state may be taxed by the state in which such purchases occur is no reason to allow gas to be taxed by every state in which title changes. The rule of the *Montana* case and the Comptroller's Rule 13(c) recognize that a distinction must be made between purchases by ultimate consumers and purchases by third party carriers for resale out of state to ultimate consumers. Only when the ultimate con-

sumer purchases the commodity can there be no fear that multiple taxation will not occur. And only if that fear is not present will the fair apportionment dictated by the Commerce Clause be satisfied.

(c) This Court has held that practical effect—not statutory terminology—is determinative in Commerce Clause challenge cases.

The court below sought to distinguish the *Michigan-Wisconsin* case solely on the ground that the tax there "was designed to use the 'gathering' of gas, not the sale of gas, in computing the franchise tax" (Appendix, Item 1, p. A9). In the *State of Maryland* case, this Court held that (101 S.Ct. 2134):

> "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of a State's tax scheme. 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' "

The same view was again expressed in the *Montana* case where it was pointed out that (101 S.Ct. 2953):

> "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' "

On every aspect of treatment of the Commerce Clause challenge the decision below is inconsistent with the rulings of this Court. Although the Court of Civil Appeals did not have the benefit of this Court's opinions in the *State of Maryland* and the *Montana* cases, both were urged on motion for rehearing in the Texas Supreme Court. It, therefore, cannot be assumed that the state

courts will in the future be guided by this Court's opinions rather than by the decision here subject to review. An erroneous precedent inconsistent with this Court's decisions should not be allowed to stand.

III.

THE STATE APPELLATE COURT REFUSED TO CONSIDER A SUBSTANTIAL FEDERAL ISSUE ON THE BASIS OF WHICH THE TRIAL COURT HAD RULED FOR PETITIONERS.

One of the grounds on which the trial court based its judgment for Petitioners was the conclusion of law that under the circumstances of these consolidated cases the classification of the gross receipts from Petitioners' sales as "business done in Texas" denied Petitioners equal protection of the law in violation of the Fourteenth Amendment. It is the established law of Texas that an appellate court must sustain a trial court judgment if it is correct on any theory of law applicable to the case, *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S.W.2d 73 (1939); *Custom Leasing, Inc. v. Texas Bank and Trust Co.*, 516 S.W.2d 138 (Tex. Sup. 1974). Respondents, as Appellants in the Court of Civil Appeals, attacked the trial court's equal protection conclusion by a specific point of error, but as was later conceded (Texas Supreme Court Response, 31), the court below made no mention of the issue in its opinion.

(a) This Court has held that states in the exercise of their taxing powers are subject to the Equal Protection Clause.

The refusal of the appellate court to consider the equal protection ground of the trial court's judgment cannot

be excused on the ground that it was not applicable to the case. In *Allied Stores v. Bowers,* 358 U.S. 522 (1959), this Court held that (358 U.S. 526):

> "States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment."

That holding was repeated or paraphrased in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973); *Barrett v. Shapiro,* 411 U.S. 910 (1973); and *Kahn v. Shevin,* 416 U.S. 351 (1974).

(b) Guidelines set by this Court should have been applied.

As noted above, all of the gas here involved was dedicated to interstate commerce and sold out of state to ulitmate consumers subject to the regulatory authority of the FERC. The court below has held that gross receipts from Petitioners' sales should be treated as "gross receipts from business done in Texas" even though the Comptroller's own rules expressly exempt from "business done in Texas" revenue from ticket sales in Texas for air travel to other states and revenue from sales of oil, goods and merchandise delivered to a third party carrier for delivery to ultimate consumers outside the State of Texas, regardless of F.O.B. designation, Rule 13(c)(1) and (3). Moreover, it was stipulated that in prior litigation based upon one of the same tax years involved here, the Comptroller conceded that gross receipts from sales of gas by Texaco under circumstances identical with those under which Petitioners' sales were made did not constitute "gross receipts from business done in Texas" (Tr. 165, 253) and that Marathon Oil Company was granted a refund because during the same period it had mistakenly

included gross receipts from sales of gas in interstate commerce as "gross receipts from business done in Texas" (Tr. 457, 471).

The obvious discrimination against Petitioners cannot be camouflaged, disguised or in any manner justified. In the *Allied Stores* case noted above, this Court expressly explained that (358 U.S. 527):

> ". . . there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary."

In *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois,* 386 U.S. 753 (1967), there was no question that the state statute was so phrased as to include the corporation within the definition of retailer and to subject it to the tax. The attack there was grounded both on the Fourteenth Amendment and on the Commerce Clause, which this Court found to be subject to similar tests. The corporation's sales there—like Petitioners' sales here—were all in interstate commerce. After distinguishing decisions urged by Illinois, this Court explained that (386 U.S. 759):

> "Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision through-

> out the Nation with power to impose sales and use taxes."

Except for the differences in the identification of the taxes and in the transportation by interstate pipelines rather than by mail, the same statement could be made with regard to the case at bar. The final holding by which the state court decision was reversed reads (386 U.S. 760):

> "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."

It is similarly well settled that the Equal Protection Clause condemns any invidious discrimination, *Morey v. Doud,* 354 U.S. 457 (1957). No reasonable distinction has been or could be offered for the different treatment received by Petitioners, *Kahn v. Shevin,* 416 U.S. 351 (1974). The Equal Protection Clause is aimed at all official actions, not just those of state legislatures, *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979). In *Whyy, Inc. v. Borough of Glassboro,* 393 U.S. 117 (1968), this Court found that the Petitioner had been denied equal protection by a statutory provision which granted tax exemption to nonprofit corporations incorporated within the state but denied the exemption to out-of-state nonprofit corporations. Petitioners here have been subjected to the same type of discrimination. Their competitors have not been subjected to the same tax burden as Petitioners will have incurred in connection with the very same types of transactions. Such taxation resulting from an interpretation of a state statute by the Comptroller of Public Accounts of the State of Texas creates

an invidious discrimination for which no reasonable distinction can be offered.

PRAYER

For each and all of the reasons set forth above, Petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

SANDER W. SHAPIRO

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CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents by depositing the same in the United States Mail, postage prepaid, addressed to Mr. Gilbert J. Bernal, Jr., Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

MARY JOE CARROLL

APPENDIX

Item 1

IN THE
COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS
AT AUSTIN

NO. 13,217

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS, ET AL.,
Appellants

vs.

ENSERCH EXPLORATION, INC., ET AL.,
Appellees

From the District Court of Travis County,
53rd Judicial District No. 250,811
Honorable Charles D. Mathews, Judge Presiding

This is a franchise tax case involving the construction of Tex. Tax—Gen. Ann. art. 12.02(1)(b)(i) enacted in 1969.

This case presents a consolidation of two actions brought by three corporations, Enserch Exploration, Inc., Continental Oil Company, and South Texas Natural Gas Gathering Company, appellees, for the refund of fran-

chise taxes paid under protest to appellant, Bob Bullock, Comptroller of Public Accounts of Texas.[1]

The critical issue is whether appellees' sales of natural gas with deliveries in Texas to interstate pipeline companies for resale outside of Texas constitute "business done in Texas" and are therefore included as appellees' gross receipts for their business done in Texas.

The trial court held that appellees were not liable for the tax. We reverse and render judgment for the State and hold that the tax, as levied, is valid.

I.

The Texas franchise tax, Tex. Tax.—Gen. Ann. art. 12.01-12.22 (1969), is imposed on every domestic and foreign corporation chartered or authorized to do business within the state or doing business within the state and not specifically exempted from the payment of such tax. For the franchise tax years in question, appellees' taxes were based on the portion of their stated capital, surplus and undivided profits allocated to Texas under Article 12.02. Under Article 12.02, the portion of a corporation's taxable capital allocated to Texas is determined by multiplying such corporation's total taxable capital by a fraction, the numerator of which is the corporation's gross receipts from business done in Texas and the denominator of which is the corporation's total gross receipts.

Article 12.02 is as follows:

---

1. Audits conducted by the Comptroller of the franchise tax returns for appellees Enserch and Continental's tax years 1969 through 1975 and appellee South Texas' tax periods from May 1, 1969 through April 30, 1976, resulted in the payment under protest of franchise taxes totalling $565,672.14.

"(1)(a) *Each corporation* liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which *the gross receipts from its business done in Texas* bear to the total gross receipts of the corporation from its entire business.

(b) *For the purpose of this Article, the term 'gross receipts from its business in Texas' shall include*:

(i) *Sales of tangible personal property* when the property is *delivered or shipped to a purchaser within this State, regardless of the F.O.B. point or other conditions of the sale . . .*" (Emphasis added).

Appellees, Enserch and Continental, sell the gas they produce to interstate transmission companies which transport the gas to ultimate destinations located outside of Texas. Appellee, South Texas, purchases natural gas from producers and gathers, transports and sells this gas to interstate transmission companies in Texas which transport the gas to destinations in states other than Texas. There is a continuous and uninterrupted movement of the gas sold through the connecting pipeline of appellee South Texas and its purchasers from the time the gas is acquired by South Texas until it reaches its ultimate destination in another state.

The sales in dispute were made pursuant to Certificates of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission and are subject to the regulatory powers of the Federal Energy Regulatory Commission.

Appellants are before us on numerous points of error which, in essence, contend that appellees' gross receipts

from sales of natural gas with deliveries in Texas to interstate pipeline companies in Texas, constitute gross receipts from "business done in Texas" under Article 12.02. It is appellants' poistion that, in spite of the fact that this natural gas is eventually delivered by third parties to destinations outside of Texas, the sale of the natural gas is completed within the state and is therefore taxable. We agree with this conclusion.

It is self-evident from the facts (which were stipulated) that appellees are not sellers of natural gas to out-of-state buyers. These transactions begin and end in Texas. Article 12.02 (1)(b)(i) clearly provides that "when the property is delivered or shipped to a purchaser within this State" a sale of such property constitutes gross receipts from business done in Texas, *"regardless of the F.O.B. point or other conditions of sale. . . ."* It makes no difference that the gas eventually moves in interstate commerce. For the purposes of this tax, its status is simply determined by whether such property, when sold, is delivered or shipped to a purchaser within Texas.

The statute in question is clear and unambiguous and means exactly what it says when it is applied to the facts in this case. See Citizens Nat'l Bank v. Calvert, 527 S.W.2d 175 (Tex. 1975).

II.

Appellees strongly urge that two former opinions of this Court uphold their theory that the sales in question were not "business done in Texas." They are Clark v. Atlantic Pipe Line Co., 134 S.W.2d 322 (Tex. Civ. App. 1939, writ ref'd), and Flowers v. Pan American Refining Corp., 154 S.W.2d 982 (Tex. Civ. App. 1941, writ ref'd). In our judgment these cases are not on point.

In *Atlantic,* a franchise tax case, the oil moved through Texas by Atlantic's pipelines and, for the most part, was delivered to the coast to where it was loaded aboard oil tankers which then delivered the oil to the purchasers in other states. The Court said: "We hold that the language, 'business done in Texas,' as employed in this statute was intended to mean business begun and completed in Texas, and not business begun in Texas and completed in some other state or foreign nation, or vice-versa." 134 S.W.2d at 328. It should be noted that the Court felt restrained by Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90 (1937). That case held that a state could not tax a local activity (stevedoring) that could not be separated from interstate commerce. Washington Revenue Dept. v. Stevedoring Ass'n, 435 U.S. 734 (1978), overruled that concept. Services that were performed within a state could be taxed by a state even though the services were an integral part of interstate commerce.

Nor would *Pan American* change our view. It is also a franchise tax case holding that the tax cannot be levied on gross receipts from sales of products which were refined or manufactured in Texas but sold outside of Texas. Again, the Court held that "business done in Texas" meant business begun and completed in Texas. Since *Atlantic* and *Pan American,* the Legislature, in 1969, amended the statute to include Art. 12.02(1)(b)(i) which includes in the definition of business done in Texas the "[s]ales of tangible personal property when the property is delivered or shipped to a purchaser within this state *regardless of the F.O.B. point or other conditions of the sale . . .*" (emphasis added).

III.

Next, appellees contend that their view as to liability under the tax in question has been sustained by lonstanding departmental construction of the statute. In this respect, they cite Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967), for the proposition that the term "doing business in Texas" contained in Article 12.02 is ambiguous and that prior departmental construction determined that case in spite of a rather nebulous argument of the Comptroller to the contrary. That case involved dividend income from foreign corporations. The statute on those facts was ambiguous. Humble v. Calvert, however, was also decided before the 1969 amendment that added Art. 12.02(1)(b)(i). In our judgment, the Legislature has provided the Comptroller with a clear, unambiguous mandate to collect this tax, and this Court is bound to enforce it.

Appellees also contend in their claim of departmental construction that the Comptroller and the Attorney General of Texas have construed Article 12.02, as amended in 1969, as not imposing any tax when petroleum products are delivered to out-of-state purchasers. The Comptroller issued a letter on August 4, 1971, to the Texas Mid-Continent Oil and Gas Association which (although argued to the contrary by the State) apparently ruled that sales of crude oil and gas for ultimate shipment outside of Texas do not constitute receipts from "business done in Texas" for the purpose of calculating and reporting franchise tax. However, after the 1969 amendment set out above was enacted, whatever discretion that was vested in the Comptroller to interpret the law vanished. He was then without any authority to bind the state in

any manner *contra* to the explicit dictates of the statute. Central Power & Light Co. v. State, 165 S.W.2d 920 (Tex. Civ. App. 1942, writ ref'd), *app. dism'd,* 319 U.S. 727; Brown Express, Inc. v. Railroad Commission, 415 S.W.2d 394 (Tex. 1967); Eddins-Walcher Butane Co. v. Calvert, 298 S.W.2d 93 (Tex. 1957); Citizens Nat'l Bank v. Calvert, *supra.*

Attorney General's Opinion No. M-829 (1971) discussed only the "receipts from sales of petroleum products refined in Texas and sold and shipped to out-of-state purchasers" where the F.O.B. loading points were in Texas. It did not discuss receipts from sales of petroleum products that were delivered to the purchaser in the state of Texas. The opinion, however, did state that "Article 12.02(1)(b)(i) . . . clearly contemplates that the F.O.B. point shall not control and that *the point where the purchaser actually takes possession of the property shall be the place of delivery for purposes of this statute.*"

Before the 1969 amendment, the courts have consistently held that "business done in Texas" means business that began and ended in Texas. After the 1969 amendment the sale of tangible personal property need not begin in Texas but if the property is delivered to a purchaser in Texas then Art. 12.02 clearly states that it is business done in Texas. Consequently, when it was re-enacted in 1975 without change, this in no way breathed new life into an erroneous opinion issued in the interim. San Antonio Union Junior College Dist. v. Daniel, 206 S.W.2d 995 (Tex. 1947).

IV.

Appellees contend that the franchise tax on the sale of gas, under the facts described, places an undue burden

on interstate commerce and violates the commerce clause. We do not agree. It is clear that a tax on interstate commerce does not violate the commerce clause if certain conditions are met. Washington Revenue Department v. Stevedoring Ass'n, 435 U.S. 734 (1978), Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

> "As was recognized in Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 82 Ed. 823, 58 S.Ct. 546, 115 A.L.R. 944 (1938), interstate commerce must bear its fair share of the state tax burden. The Court repeatedly has sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State."

Stevedoring, supra at 750.

The franchise tax, as applied to these facts, meets those requirements. As stipulated at trial "[o]nly sales of gas with delivery in Texas to interstate pipeline companies for delivery and resale outside of the State of Texas are involved in this cause." Appellees gather, transport, and sell the gas within the state of Texas. Title and possession are transferred within Texas. The appellees have admitted that they are not taxed for these sales in any other state. There is no discrimination against interstate commerce since all such sales of gas whether for ultimate use out-of-state or in-state are considered in computing the franchise tax. There is also no claim that the services provided by the state are not sufficiently related to the tax.

Appellees, nevertheless, claim that Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954), is on point and is controlling. That case also involved a Texas

franchise tax, natural gas and interstate pipelines. The franchise tax, however, was significantly different. It was designed to use the "gathering" of gas, not the sale of gas, in computing the franchise tax. Thus the buyer of the gas was taxed, not the seller. The Court held that "as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another." *Id.* at 169. The Supreme Court also noted in footnote 18 of *Stevedoring* that the tax in *Michigan-Wisconsin* was "unconstitutional because it amounted to an *unapportioned* levy on the transportation of the entire volume of gas," *Stevedoring, supra* at 749 (emphasis added).

Here the sale of gas, not just the transfer of possession, *is* the basis of the franchise tax. Also, there can be no claim that the tax is unapportioned. The transactions in question took place entirely within Texas. Appellees produced or purchased the gas in Texas and delivered the gas to purchasers within Texas. They have no further connection with the gas after the gas is transported out of the state by the purchaser. No other state could use these transactions as a basis for imposing a tax upon appellees.

The franchise tax does not violate the Supremacy Clause, U.S. Const. art. VI, cl. 2. There can be no real argument that the purpose of the federal regulation of the interstate sale of natural gas is to have reasonable rates for natural gas. The regulations allow the consumer to pay a reasonable price for natural gas and allow the seller to make a reasonable profit. It is *not* the purpose of the federal regulations to shift all the cost of the state services

supplied to this industry to the taxpayers of the producing state.

In setting up these regulations Congress clearly intended that the price of natural gas would reflect the reasonable costs of its production and transportation. These costs include the taxes that are reasonably and fairly imposed by a state. *See* Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). There is no claim that the franchise tax is not reasonable.

V.

Finally, appellees contend that they are not liable for the taxes from 1969 to 1975 since the Comptroller is attempting to impose a retroactive law. They claim that Tex. Att'y Gen. Op. No. M-829 (1971) and the Comptroller's August 4, 1971, letter were rules. These rules had the statutory effect of precluding the collection of the taxes in question. Tex. Att'y Gen. Op. No. H-640 (1975) was a reversal of these rules and could not be applied retroactively.

We do not agree. The Comptroller is merely enforcing Art. 12.02 as amended in 1969. Article 12.02 has imposed this tax upon appellees since 1969. There is no retroactive application of Art. 12.02 since all the transactions in question occurred after the 1969 amendment. Erroneous interpretation of a law by the Comptroller or the Attorney General may not invalidate a clear and unambiguous statute.

The Comptroller has no authority to promulgate a rule (assuming only for argument that the August 4, 1971, letter was a rule) that is inconsistent with the laws of this state. Tex. Tax.—Gen. Ann. art. 12.12 (Supp.

1980), Citizens Nat'l Bank v. Calvert, *supra*. Attorney General opinions are not statutory themselves and may be disregarded by the courts if the statutes that they are based on are clear and unambiguous. Steakley v. West Texas Gulf Pipeline Co., 336 S.W.2d 925 (Tex. Civ. App. 1960, no writ). Also as stated above, we do not believe that Tex. Att'y Gen. Op. No. M-829 is applicable to this case.

The judgment of the trial court is reversed and judgment is hereby rendered for appellants.

John C. Phillips, Chief Justice

Reversed and Rendered

Filed: April 1, 1981

Associate Justice Powers not sitting

IN THE
COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS
AT AUSTIN

JUDGMENT RENDERED APRIL 1, 1981

13,217—BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. V. ENSERCH EXPLORATION, INC., ET AL.

APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY

REVERSED AND RENDERED—Opinion by Chief Justice Phillips—Associate Justice Powers not sitting

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the trial court's judgment; IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court is reversed, and judgment is here rendered that appellees take nothing by their suit. It is FURTHER ordered that appellees pay all costs in this behalf expended both in this Court and the court below and that this decision be certified below for observance.

A13

Item 2

IN THE SUPREME COURT OF TEXAS

July 22, 1981

NO. C-394

ENSERCH EXPLORATION, INC., ET AL.

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS ET AL.

From Travis County

Third District

Application on behalf of Enserch Exploration, Inc., et al., and application on behalf of South Texas Natural Gas Gathering Co., for writs of error to the Court of Civil Appeals for the Third Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, Enserch Exploration, Inc. et al., and applicant, South Texas Natural Gas Gathering Co., pay all costs incurred on their respective application.

Item 3

September 23, 1981

NO. C-394

ENSERCH EXPLORATION, INC. ET AL.

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS ET AL.

From Travis County

Third District

Motion for rehearing of application for writ of error on behalf of Enserch Exploration, Inc., et al., together with motion for rehearing on behalf of South Texas Natural Gas Gathering Company having been duly considered, it is ordered that said motions be, and hereby are, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and SEAL of the Supreme Court of Texas at the City of Austin this the 2nd day of November, 1981.

GARSON R. JACKSON, Clerk

By /s/ MARY M. WAKEFIELD
Mary M. Wakefield, Chief Deputy

Item 4

NO. 248,794

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
53RD JUDICIAL DISTRICT

SOUTH TEXAS NATURAL GAS
GATHERING COMPANY,
Plaintiff,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Defendants.

NO. 250,811

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
53RD JUDICIAL DISTRICT

ENSERCH EXPLORATION, INC.,
Plaintiff,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Defendants.

NO. 251,748

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
201ST JUDICIAL DISTRICT

CONTINENTAL OIL COMPANY,
Plaintiff,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Defendants.

FINAL JUDGMENT

BE IT REMEMBERED:

That on the 16th day of July, 1979, the above entitled and numbered causes, which were consolidated for trial under Cause No. 250,811, and in which South Texas Natural Gas Gathering Company, Enserch Exploration, Inc. and Continental Oil Company, are plaintiffs and Bob Bullock, Comptroller of Public Accounts of the State of Texas, Jesse James, State Treasurer of the State of Texas, and John L. Hill, Jr., Attorney General of the State of Texas, are defendants, came on for trial.

Thereupon, came all the parties by and through their attorneys and announced ready for trial and all parties agreed to waive a jury and submit all matters of fact, as well as all matters of law, to the Court for final determination.

Thereupon, the Court proceeded to hear the stipulations of the parties, evidence and argument of counsel in support of their positions and the Court announced that it was of the opinion, and so finds, that the law and facts in this cause are with Plaintiffs and against Defendants and that said Plaintiffs have judgment as hereafter decreed.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the stipulations of fact agreed to by the parties in this cause are found as fact and that Plaintiffs South Texas Natural Gas Gathering Company, Enserch Exploration, Inc. and Continental Oil Company recover the taxes paid under protest as shown by the pleadings filed by Plaintiffs in this cause, along with interest thereon according to law from the date of payment of said taxes, and that said Plaintiffs recover of Defendants, and their successors, Bob Bullock, Comptroller of Public Acounts of the State of Texas, Jesse James, State Treasurer of the State of Texas, whose successor is Warren G. Harding, and John L. Hill, Jr., Attorney General of the State of Texas, whose successor is Mark White, all costs in this behalf expended for which they may have their execution.

All relief sought herein which is not expressly granted is denied.

RENDERED, SIGNED and ORDERED entered of record this, the 2nd day of November, 1979.

/s/ CHARLES D. MATHEWS
Judge Presiding

APPROVED AS TO FORM

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WILLIAM R. VOLK
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ATTORNEYS FOR SOUTH TEXAS NATURAL GAS GATHERING COMPANY

By /s/ C. W. WELLEN

Item 5

NO. 250,811

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
53RD JUDICIAL DISTRICT

SOUTH TEXAS NATURAL GAS GATHERING COMPANY, ENSERCH EXPLORATION, INC. and CONTINENTAL OIL COMPANY,
Plaintiffs,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Defendants for Conclusions of Law and the request of Plaintiffs for Findings of Fact and Conclusions of Law in the above entitled and numbered cause, I make and file the following as my Findings of Fact and Conclusions of Law therein:

Findings of Fact

1. The facts contained in the Second Stipulation dated and filed herein by Plaintiff South Texas Natural Gas Gathering Company and Defendants on January 22, 1979, are hereby found as fact by the Court and such Second Stipulation is incorporated herein by reference for all purposes.

2. The facts contained in the stipulations filed herein by Plaintiffs Enserch Exploration, Inc. and Continental Oil Company and Defendants are hereby found as fact by the Court and such stipulations are incorporated herein by reference for all purposes.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of these consolidated cases and over the parties thereto.

2. Article 12.01, *et seq.* Tex. Tax—Gen., does not authorize the assessment and collection by the State of Texas of the taxes paid under protest by Plaintiffs which are at issue in these consolidated cases (hereinafter referred to as the "taxes paid by Plaintiffs").

3. The taxes paid by Plaintiffs were paid as a result of assessments by the defendant Comptroller of Public Accounts which were based upon an erroneous construction of Article 12.01 Tex. Tax.—Gen., and especially Article 12.02, Tex. Tax.—Gen.

4. Plaintiffs' gross receipts from sales during the years in dispute of natural gas to interstate pipeline companies for delivery to ultimate destinations outside of the State of Texas (hereinafter referred to as "Plaintiffs' sales") do not constitute gross receipts from "business done in Texas" under Article 12.02, Tex. Tax.—Gen.

5. All of the natural gas the subject of Plaintiffs' sales was dedicated to interstate commerce.

6. All of Plaintiffs' sales were in interstate commerce.

7. The assessment of the taxes paid by Plaintiffs constitutes an impermissible burden on interstate commerce

in violation of Article I, section 8, clause 3, of the Constitution of the United States.

8. The assessment of the taxes paid by Plaintiffs constitutes an obstacle to the accomplishment and execution of the full purposes and objectives of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and violates the supremacy clause of the Constitution of the United States.

9. The departmental construction of Article 12.02, Tex. Tax—Gen., and its predecessor statutes, and the departmental practices conforming thereto, by the defendant Comptroller of Public Accounts, from adoption of such construction and practices by the Comptroller in or about the year 1941 until July 14, 1975, the date on which Attorney General Opinion No. H-640 was published, were to the effect that the gross receipts from transactions such as Plaintiffs' sales did not constitute gross receipts from "business done in Texas" under Article 12.02, Tex. Tax. —Gen., and its predecessors.

10. The departmental construction and practices referred to in Conclusion No. 9 above were in effect all of the years in dispute. Such departmental construction was published and disseminated to Plaintiffs, among others, and Plaintiffs had the right to and did rely on such construction in calculating their franchise tax liabilities for the years in dispute.

11. The departmental construction and practices referred to in Conclusion No. 9 above are consistent with all of the reported judicial decisions and Opinions of the various Attorneys General until publication of Attorney General Opinion No. H-640 on July 14, 1975.

12. The various amendments to Article 12.02, Tex. Tax.—Gen., and its predecessors, beginning in 1959 and continuing through the years in dispute, adopted the judicial and administrative construction described in Conclusion Nos. 9, 10 and 11 above, and none of such amendments required an alteration of such construction.

13. Were it not for the judicial and administrative construction referred to in Conclusion Nos. 9, 10 and 11 above, Article 12.02(1)(b) and (1)(b)(i), Tex. Tax.—Gen., and their predecessor statutes, would be ambiguous as they relate to the gross receipts from Plaintiffs' sales. Such judicial and administrative construction of such provisions, coupled with the various amendments to Article 12.02, Tex. Tax.—Gen., enacted after adoption of such judicial and administrative construction but which did not require an alteration of such construction, gave such construction the force of law which could not be changed without clear legislative mandate.

14. The construction of Article 12.02, Tex. Tax.—Gen. upon which the defendant Comptroller of Public Account's assessment of the tax paid by Plaintiffs is based cannot be applied retroactively to increase the franchise tax liabilities of Plaintiffs.

15. The classification of the gross receipts from Plaintiffs' sales as "business done in Texas" under the circumstances of these consolidated cases denies to Plaintiffs equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, section 9 and section 3, of the Texas Constitution, and results in taxation which is neither uniform nor equal in violation of Article VIII, section 1 of the Texas Constitution.

16. The assessment of the taxes paid by Plaintiff South Texas Natural Gas Company is based upon an erroneous construction of Article 12.02, Tex. Tax.—Gen., in addition to the reasons stated above, because such Plaintiff is a natural gas pipeline company and not a natural gas producer. Attorney General Opinion No. H-640 is limited by its own terms to natural gas producers and does not apply to natural gas pipeline companies.

17. Plaintiffs are entitled to recover the taxes paid under protest as shown by the pleadings filed by Plaintiffs in these consolidated cases, together with interest thereon according to law.

SIGNED AND ORDERED of record this the 15th day of January, 1980.

/s/ CHARLES D. MATHEWS
Charles D. Mathews,
Judge Presiding,
53rd District Court,
Travis County, Texas

Item 6

The Natural Gas Act, 115 U.S.C. § 717, (b) and (c):

"(b) The provisions of this chapter shall apply to the tranpsortation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

"(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

The Natural Gas Act, 15 U.S.C. § 717a(7):

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

The Natural Gas Act, 15 U.S.C. § 717c:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful. . . .

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) When ever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initia-

tive without complaint, at once, and if it so orders, without answer or formal pleadings by the naturalgas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspensions, may suspend the operation of such schedule and defer the use of such rate, charge, clasisfication, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep acurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the

natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

The Natural Gas Act, 15 U.S.C. § 717d(a):

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.'

The Natural Gas Act, 15 U.S.C. § 717f(b) and (c)(1)(A):

"(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and ap-

proval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

"(c)(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . ."

Item 7

Article 12.02, Taxation-General, Title 122A of the Revised Civil Statutes of the State of Texas:

"(1) (a) Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business.

"(b) For the purpose of this Article, the term 'gross receipts from its business done in Texas' shall include:

(i) Sales of tangible personal property when the property is delivered or shipped to a purchaser within this State, regardless of the F.O.B. point or other conditions of the sale, reduced by the deduction, if applicable, allowable under Subsection (c) of this Section (1);

(ii) Services performed within Texas;

(iii) Rentals from property situated, and royalties from the use of patents or copyrights, within Texas, and

(iv) All other business receipts within Texas.

"(c) If any sales covered by Subsection (b)(i) of this Section (1) are sales of food or food products exempted from the Limited Sales, Excise and Use Tax under Section (L), Article 20.04, Title 122A, Taxation-General, Revised Civil Statutes of Texas, 1925, as amended, or drugs, medicines, or other products exempted under Section (M), Article 20.04 of that Title, as amended, then a deduction is allow-

able to the extent of sales of these exempted items shipped from outside the State of Texas.

"If any provision of this Subsection (c) or the application thereof to any person, corporation, or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Subseciton (c) are declared to be severable and the deduction inapplicable.

"(d) For the purpose of this Article, the term 'total gross receipts of the corporation from its entire business' shall include all of the proceeds of all sales of the corporation's tangible personal property, all receipts from services, all rentals, all royalties and all other business receipts, whether within or outside of Texas. Provided, however, that, as to the sale of investments and capital assets, the term 'total gross receipts of the corporation from its entire business' shall include only the net gain from such sales.

"(2) If the allocation and apportionment provisions of Section (1) of this Article do not fairly represent the extent of the taxpayer's business activity in Texas, the taxpayer may petition for and the Comptroller may permit, in respect to all or any part of the taxpayer's business activity, if reasonable:

"(a) separate accounting;

"(b) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in Texas; or

"(c) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's capital."

Supplemental Brief

81-1167

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ALEXANDER STEVAS,

NO. _____

Supreme Court of the United States

OCTOBER TERM, 1981

ENSERCH EXPLORATION, INC., and
CONTINENTAL OIL COMPANY,
Petitioners

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents

On Writ of Certiorari to the Court of Civil Appeals For the Third Supreme Judicial District of Texas

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

SANDER W. SHAPIRO
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Continental Oil Company, (now *Conoco Inc.*) has the following subsidiaries (other than wholly-owned subsidiaries) or affiliates:

Big Sky of Montana Realty, Inc.
Calcasieu Chemicals Corporation
Condea Chemie, GmbH
CitCon Oil Corporation
Conch International Methane, Ltd.
Conoco, A.G.
  Petroquimica Espanola, S.A. (Petresa)*
  T.A.L. (Austria)*
  T.A.L. (Italy)*
  T.A.L. (Luxembourg)*
Conoco Limited
Conoco Management Company
  Conoco Exploration, Ltd.*
Conoco Mineraloel GmbH
  T.A.L.*
Conoco North Sea, Inc.
  K/s Statfjord Transport A. S. & Co.*
  Statfjord Transport A.S.*
Conoco Norway Inc.
  K/s Statfjord Transport A.S. & Co.*
  Statfjord Transport A.S.*
Consolidation Coal Company — 100%
  Bishop Coal Company*
  Cardinal River Coals, Ltd.*
  Contochu, Inc.*
  Harmar Coal Company*
  Itmann Coal Company*
  Mathies Coal Company*
  Consolidation Coal Sales Company*
  Wolfpen Knob Development Company*
  Stone Cove Coal Company

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* Indicates partially owned company of wholly owned subsidiary.

Continental Carbon Company
- Carbon Black Espanola, S.A.
- Columbian Continental Europa, S.p.A.
- Compagnie Francaise du Carbon Black, S.A.
- Continental Carbon Australia Pty. Limited
- Continental Columbian Carbon Nederland, B.V.
- Continex Francaise S.A.R.L.
- Continex Nederland B.V.
- Continex S.r.l.
- Lucky Continental Carbon Co., Ltd.
- Toyo Continental Carbon, Ltd.

Conoco (U.K.) Limited
- Associated Petroleum Terminals (Immingham) Ltd.*
- Cliffe Storage, Ltd.*
- Crude Oil Terminals, Ltd.
- Humber Oil Terminals Trustee, Ltd.*
- Petroleum Storage, Ltd.*
- Warwickshire Oil Storage, Ltd.*

Continental Pipe Line Company
- Colonial Pipeline*
- Dixie Pipeline*
- Lake Charles Pipe Line*
- Pioneer Pipe Line Company*
- Platte Pipe Line*
- Seadock, Inc.*
- Seaway Pipeline, Inc.
- West Shore Pipe Line*
- Yellowstone Pipe Line*

Explorer Pipeline Company
Felix Oil Company
Kettleman North Dome Association
Long Beach Oil Development Company
Maritime Protection A/S
Nippon Aluminum Alkyes, Ltd.

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* Indicates partially owned company of wholly owned subsidiary.

NissanConoco Corporation
Oil Shippers Service, Inc.
OMW (Karlsruhe)
Pasa Petroquinica Argentina, S.A.
Petroleum Terminals, Inc.
Petrocokes, Ltd.
San Jacinto Eastern Corporation
Iricon Agency, Ltd.*
Selang Ltd.
Southern Facilities, Inc.
Standard Shale Products Company

Continental Oil Company (now *Conoco Inc.*): Conoco Inc. is now a wholly-owned subsidiary of E. I. DuPont de Nemours and Company.

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* Indicates partially owned company of wholly owned subsidiary.

Opposition

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NO. 81-1167

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ENSERCH EXPLORATION, INC., and
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V.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents

* * *

On Writ of Certiorari to the Court of Civil Appeals
For the Third Supreme Judicial District of Texas

* * *

RESPONDENTS' BRIEF IN OPPOSITION

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NO. 81-1167

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ENSERCH EXPLORATION, INC., and
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Petitioners

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents

* * *

On Writ of Certiorari to the Court of Civil Appeals
For the Third Supreme Judicial District of Texas

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

QUESTIONS PRESENTED FOR REVIEW

Can Petitioners' Texas franchise tax be measured by sales of natural gas which occur wholly in Texas concurrently with the regulation of such natural gas by the Natural Gas Act?

Is the Texas franchise tax on Petitioners fairly apportioned when such tax is measured by sales of natural gas occurring only in Texas?

Have Respondents applied the proper interpretation of Article 12.02(1)(b)(i), Title 122A, V.T.C.S., to all corporations, including Petitioners, to thus afford Petitioners the equal protection of the laws under the Fourteenth Amendment?

LIST OF PARTIES

Enserch Exploration, Inc., Petitioner

Continental Oil Company, Petitioner

South Texas Natural Gas Gathering Company, a participant in all state court litigation as Plaintiff in the trial court, Appellee in the Court of Civil Appeals, and Petitioner in the Supreme Court of Texas.

Bob Bullock, Comptroller of Public Accounts for the State of Texas, Respondent

Mark White, successor in office to John Hill as Attorney General of Texas, Respondent

Warrent Harding, successor in office to Jesse James as Treasurer of Texas, Respondent

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners adequately set forth the constitutional and statutory provisions involved herein in their Petition for Writ of Certiorari and the Appendix thereto.

STATEMENT OF THE CASE

Petitioners, Enserch Exploration, Inc., and Continental Oil Company, sued Respondents for the recovery of franchise taxes, penalties and interest paid under protest pursuant to Article 1.05, Taxation—General, Title 122A, V.T.C.S. The franchise taxes at issue relate to the period from December, 1969, to October, 1975. Petitioners are engaged in the business of producing and selling natural gas, and only their sales in Texas of such gas are at issue. (Transcript, Volume I, p. 120) (Hereinafter cited as Tr., Vol.____,____). Prior to the issuance of Texas Attorney General Opinion H-640 on July 14, 1975 (Tr., Vol. I, 134-141) these sales were not considered as "gross receipts from business done in Texas" despite the clear language of Article 12.02(1)(b)(i), Tax—Gen., Title 122A, V.T.C.S., because of a letter dated August 4, 1971, (Tr., Vol. I 125) which had misconstrued these sales as not being "gross receipts from business done in Texas."

After the issuance of Opinion H-640, Respondent Comptroller of Public Accounts audited Petitioners' franchise tax accounts and issued franchise tax deficiencies against Petitioners which led to the payment of the protested taxes at issue. (Tr., Vol. I, 123). These deficiencies were based on the application of the unambiguous statute, Article 12.02(1)(b)(i), to include Petitioners' sales of natural gas in Texas as "gross receipts from business done in Texas," thus increasing Petitioners' percentage of business done in Texas over their entire business under Article 12.02(1)(b), Tax-Gen., Title 122A, V.T.C.S.

After the parties submitted a fully stipulated case (Tr., Vol. I, 118, Vol. II, 252 and 330), the trial court entered judgment for Petitioners to recover the amounts paid under protest. (Tr., Vol. II, 480-482). The trial court issued findings of fact and conclusions of law (Petitioners' Appendix, Item 5, pp. A21-A23) (Hereinafter cited as Pet. App., Item ____,____), including those set out on pages 4 and 5 of Petitioners' Petition for Writ of Certiorari, regarding interstate commerce, the supremacy clause and equal protection. The Court of Civil Appeals reversed the trial court's judgment (Pet. App., Item 1, A1-11), pointing out that,

> The critical issue is whether appellees' sales of natural gas with deliveries in Texas to interstate pipeline companies for resale outside of Texas constitute 'business done in Texas' and are therefore included as appellees' gross receipts for their business done in Texas. (Pet. App., Item 1, A2).

The Court of Civil Appeals acknowledged that the sales in dispute were subject to the regulatory powers of the Federal Energy Regulatory Commission (FERC) (Pet. App. Item I, A3) and added that, "It is self-evident from the facts . . . that appellees are not sellers of natural gas to out-of-state buyers. These transactions begin and end in Texas." (Pet. App., Item 1, A4).

Contrary to Petitioners' view, the Court of Appeals did not agree that *Clark v. Atlantic Pipe Line Co.*, 134 S.W.2d 322 (Tex Civ. App.—Austin 1939, writ ref'd) and *Flowers v. Pan American Refining Corporation*, 154 S.W.2d 982 (Tex. Civ. App.—Austin 1941, writ ref'd) approved of any treatment of Petitioners' sales as not being "gross receipts from business done in Texas." As the court of Civil Appeals pointed out, *Atlantic* involved the movement of oil to purchasers in other states, and the Court in *Atlantic* also relied on *Puget Sound*

Stevedoring Co. v. State Tax Commission, 302 U.S. 90 (1937), which was overruled by *Washington Revenue Dept. v. Stevedoring Ass'n*, 435 U.S. 734 (1978) which ruled that:

> Services that were performed within a state could be taxed by a state even though the services were an integral part of interstate commerce. (Pet. App., Item 1, A5).

The Court of Civil Appeals also pointed out that *Pan American* involved sales of products refined in Texas but sold outside of Texas, and thus was not in point. (Pet. App., Item 1, A5). Interestingly, both *Atlantic* and *Pan American* held that "business done in Texas" meant business which is begun and completed in Texas, the exact description of Petitioners' sales. (Pet. App., Item 1, A5).

ARGUMENT: REASONS FOR DENYING THE WRIT

Respondents submit that the Petition for Writ of Certiorari should be denied because none of Petitioners' rights under the Supremacy Clause, Interstate Commerce Clause and the Fourteenth Amendment were infringed.

Petitioners make various charges concerning defects in the Texas franchise tax, especially Article 12.02 (1)(b)(i), under these constitutional provisions. However, close scrutiny of the facts and applicable statutory and case law, will reveal that Petitioners' charges lack substance, and that the Court of Civil Appeals' application of Art. 12.02(1)(b)(i) to Petitioners' sales is consistent with these constitutional principles.

I. THIS COURT'S DECISION IN *STATE OF MARYLAND V. STATE OF LOUISIANA*, ___U.S.___, 101 S.CT. 2114 (1981) AND THE REGULATORY PROVISIONS OF THE NATURAL GAS ACT, 15 U.S.C. § 717 *et seq.*, SHOW THAT THE DECISION OF THE COURT OF CIVIL APPEALS DID NOT VIOLATE THE SUPREMACY CLAUSE.

Petitioners present the very simplistic argument that because the Texas franchise tax on Petitioners affects the cost of the natural gas and since the determination of pipeline and producer costs is the task of the FERC, the franchise tax has thus encroached on the FERC's authority and the Supremacy Clause. However, under federal law this theory advanced by Petitioners is completely erroneous. As this Court stated in *State of Maryland*,

> Under the present law, natural gas owners are entitled to recover from their customers all legitimate costs associated with the production, processing and transportation of natural gas. See *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967) (*cost of service normally includes proper allowance for taxes* and this allowance is 'obviously within the jurisdiction of the Commission'). 101 S.Ct. at 2130. (Emphasis added).

Petitioners fail to explain how the franchise tax at issue violates the Natural Gas Act and the Supremacy Clause when state taxes are included by the FERC as an allowance for cost of service. Petitioners have presented no factual or legal basis to show that Respondents have impeded the jurisdiction of the FERC through Article 12.02(1)(b)(i).

In *State of Maryland* it was not the Louisiana First-Use Tax itself which violated the Supremacy Clause, but Louisiana's attempt to promote that tax as a processing cost to be borne by the pipeline or other owner. In light of the FERC's jurisdiction over allowance for costs, including taxes, this Court observed:

> By specifying that the First-Use Tax is a processing cost to be either borne by the pipeline or other owner without compensation, an unlikely event in the light of the large sums involved, or passed on to purchasers, Louisiana has attempted a substantial usurpation of the authority of the FERC *by dictating to the pipelines the allocation of processing costs for the interstate shipment of natural gas.* Owners of natural gas are foreclosed by the operation of § 1303C from entering into valid contracts requiring the owners of the extracted hydrocarbons to reimburse the pipelines for costs associated with transporting and processing these products. The effect of § 1303C is to shift the incidence of certain expenses, which the FERC insists are incurred substantially for the benefit of the owners of extractable hydrocarbons, to the ultimate consumer of the processed gas without the prior approval of the FERC. 101 S.Ct. at 2130-31. (Emphasis added).

An examination of Art. 12.02(1)(b)(i) shows that it does not intrude into the area of the FERC's jurisdiction over the allocation of processing costs as does the Louisiana statute. By the time Art. 12.02(1)(b)(i) is applied to a sale to determine whether it gives rise to "Texas gross receipts", the natural gas pipeline or gas producer has entered into its contract for the sale of gas, taking into account processing costs. This Court did not hold that Louisiana had decided to enact a tax on natural gas contrary to the Natural Gas Act; this Court found disfavor

with the cost allocation provisions of the Louisiana statute which interfered with FERC jurisdiction. As this Court noted in *State of Maryland:*

> Even if the FERC ultimately determined that such expenses should be passed on *in toto*, this kind of decisionmaking is within the jurisdiction of the FERC; and the Louisiana statute, like the state commission's order in *Northern Natural Gas, supra,* is consistent with the federal scheme and must give way. 101 S.Ct. at 2131.

Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84 (1963), involved a state agency's ruling regarding a pipeline company's purchase of natural gas from wells in a particular field, which ruling violated federal jurisdiction under the Natural Gas Act. *Northern Natural Gas* did not involve state taxation versus federal regulation under the Natural Gas Act. See 101 S.Ct. at 2131.

The assessment of the Texas franchise tax on Petitioners has thus placed no obstacle on the accomplishment and execution of the full purpose of the Natural Gas Act. Significantly, in *Texas Eastern Transmission Corporation v. Kingsley, Director, Division of Taxation,* (1975), *cert. denied,* 336 A.2d 688 (N.J. 1976), *appeal dismissed,* 430 U.S. 925 (1977), the New Jersey Tax Court made the following observation:

> Both Texas Eastern and Algonquin are interstate natural gas companies within the meaning of the federal 'Natural Gas Act' (52 Stat. 82 (1938), 15 U.S.A. 717 et seq.) and, as such, are regulated by the Federal Power Commission (hereinafter 'FPC') with respect to the transportation and sale for resale of natural gas in interstate commerce. Under the terms of the

> act, the FPC has exclusive jurisdiction over all aspects of such transportation and sale for resale of natural gas by both Texas Eastern and Algonquin. The FPC's prior approval, under a certificate of public convenience and necessity, is a prerequisite to the conduct of such activities as well as to the construction or acquisition of transporation facilities. The FPC also has exclusive jurisdiction over rates, charges and earnings. (Tr., Vol. II, 271).

The fact that Texas Eastern was an interstate natural gas company, and like Petitioners, subject to the Natural Gas Act, proved to be no impediment to the lawful assessment of the New Jersey Corporation Business Tax. As stated in *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965): "The result of our decisions is to make the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption 'in interstate commerce' within the meaning of the Act." While the gas which Petitioners' purchasers resell crosses the state line, Petitioners' sales of such gas end with deliveries to purchasers within Texas, and are thus "Texas gross receipts" for purposes of Art. 12.02(1)(b)(i). Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942). Therefore, while the FERC may regulate even Petitioners' sales within Texas, such regulation does not preclude the status of such sales as "Texas gross receipts."

In *Smith v. State*, 391 P.2d 718 (Wash.1963), the Washington Supreme Court also considered Supremacy Clause arguments by the taxpayers. The Court asked: "Did licensing of appellants for coastwise trade . . . save them from the business and occupation tax in Washington?" *Id.* at 724. The Court answered:

> Nor does the Interstate Commerce Act, Part III, supra, subjecting appellants to regulation as interstate water carriers and bringing them within the jurisdiction of the Interstate Commerce Commission as a common carrier, raise a conflict between federal and state sovereignties on the matter of imposing a business and occupation tax on intrastate activities. In neither this act nor in the coastwise licensing and enrolling statute (46 U.S.C.A. § 251) has Congress sought to limit the power of the states to impose taxes upon intrastate commerce, *even though interstate commerce may be affected by such taxes in one way or another. Id.* (Emphasis added).

As is evident from *Texas Eastern Transmission Corporation v. Kingsley, supra,* (Tr., Vol. 11, 269-300) and *Smith v. State, supra,* federal regulation *and* state taxation of an intrastate activity are not inconsistent concepts, and the New Jersey tax did not impair the Natural Gas Act's jurisdiction over the rates, charges and earnings of natural gas companies. Cf. *Bel Oil Corp. v. Roland,* 137 So.2d 308 (1962), *appeal dismissed,* 371 U.S. 2 (both state taxation and regulation of a natural gas company under the Natural Gas Act involved); *Skelly Oil Company v. Federal Power Commission,* 375 F.2d 6 (10th Cir. 1967), *modified,* 390 U.S. 747, 88 S.Ct. 1344; and *United Gas Improvement Co. v. Federal Power Commission,* 283 F.2d 817 (9th Cir. 1960), *cert. denied,* 365 U.S. 879, 81 S.Ct. 1030. In *Cities Service Gas Company v. State Corporation Commission,* 567 P.2d 1343, 1350 (Kan. 1977), the Court noted:

> Under . . . the Natural Gas Act . . . Congress drew within its own regulatory power . . . *only* three things: (1) the transporation of natural gas in interstate commerce: (2) its sale in interstate commerce for *resale*; and (3) natural

> gas companies engaged in such transportation for sale . . .

Thus, the inclusion of Petitioners' sales as "gross receipts from business done in Texas" for purposes of state taxation would not inhibit federal regulation of the sale of such gas. See also *Cities Service Gas Co. v. United States*, 580 F.2d 433, 435 (footnote 1)(U.S. Ct. Cl. 1978). Consequently, the foregoing authorities show that it was not the purpose of the Natural Gas Act to prevent a state from measuring the franchise tax of a corporation based upon gross receipts derived from sales which exclusively transpire within the state.

The taxpayers in *Commonwealth Edison Company v. Montana*, ____U.S.____, 101 S.Ct. 2946 (1981) also attacked the Montana coal severance tax at issue therein on similar grounds urged by Petitioners. The taxpayers contended the Montana Tax as applied to mining of federally-owned coal was invalid under the Supremacy Clause because it frustrated the purposes of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 *et seq;* 101 S.Ct. at 2960. This Court, however, noted:

> There is nothing in language or legislative history of either the 1920 Act or the 1975 Amendments to support appellants' assertion that Congress intended to maximize and capture *all* 'economic rents' from the mining of federal coal, and then to distribute the proceeds in accordance with the statutory formula. *Id.* at 2961.

Finally, as this Court further advised in *Commonwealth Edison Company:*

> As we have frequently indicated, '[p]re-emption of state law by federal statute or regulation is *not favored* in the absence of persuasive

> reasons - either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained.' *Id.* at 2962. (Emphasis added).

Similarly, nothing in the language or legislative history of the Natural Gas Act expresses Congressional intent to intrude upon the states' powers to use sales of natural gas within those states' borders to measure a franchise tax on the sellers of that gas. With state taxes being included in the FERC's jurisdiction to make proper allowances for costs to natural gas owners, it is self-evident that Congress did not ordain in the Natural Gas Act that state taxation of natural gas could not coexist with federal regulation thereof.

II. THE COURT OF CIVIL APPEALS' DECISION COMPLIES WITH FEDERAL CONSTITUTIONAL LAW REGARDING "UNFAIR APPORTIONMENT" AND INTERSTATE COMMERCE.

In *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952) this Court held:

> The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.'

With the Courts of the State of Texas having determined that Article 12.02(1)(b)(i) operates upon Petitioners' disputed sales to include them as "gross receipts from business done in Texas," Respondents submit that the Texas franchise tax, as measured by Art. 12.02(1)(b)(i) and as construed by the highest courts of Texas, is not a tax on interstate commerce.

In *Commonwealth Edison Company v. Montana, supra,* this Court held:

> We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit's* four-part test. Under that test a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 101 S.Ct. at 2953.

This Court further observed:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance can occur in no other state' and 'no other state can tax the severance.' *Id.* at 2954.

Just as there was no question with regard to apportionment or multiple taxation regarding the Montana Tax, there is no apportionment or multiple taxation problem with the Texas franchise tax at issue because the sales of natural gas by Petitioners occurred in Texas, and furthermore, as the Court of Civil Appeals correctly noted, Petitioners have admitted that they are not taxed on these sales in any other state. (Pet. App., Item 1, A8).

Petitioners argued for the *first* time in the Texas Supreme Court that the franchise tax at issue is not fairly apportioned. (See Response to Petitioners' Application for Writ of Error, p. 21). This argument on unfair apportionment represented a desperate attempt by Petitioners to equate the tax at issue with the unapportioned tax in *Michigan-Wisconsin Pipe Line Company v. Calvert,* 347 U.S. 157 (1954), which involved an occupation tax on the gathering of gas measured by the entire volume of gas taken.

As was pointed out in *Washington Revenue Dept. v. Stevedoring Ass'n*, 435 U.S. 734 (1978), footnote 18, the tax in *Michigan-Wisconsin* was "unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas." *Id.* at 749. To illustrate this problem in *Michigan-Wisconsin*, this Court observed:

> [But] receipt of the gas in the pipelines is more than its 'taking'; from a practical standpoint it is its 'taking off' in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the state. This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other. 347 U.S. at 167.

Article 12.02(1)(b)(i) taxes neither the "taking off" nor the exit of the gas from Texas. The sales of natural gas at issue, which Art. 12.02(1)(b)(i) defines as Texas gross receipts, are entirely susceptible to inclusion as distinct local activities which form the basis for measurement of Petitioners' franchise taxes.

Washington Revenue Dept. v. Stevedoring Ass'n, supra; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); and *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), show that there is no doubt concerning the constitutionality of the franchise tax at issue in view of the Commerce Clause of the United States Constitution and in spite of Petitioners' *Michigan-Wisconsin* arguments. In *Colonial Pipeline Co.*, the Court upheld a franchise tax levied by the State of Louisiana against a pipeline company which did *no* intrastate business in Louisiana. In reaching its decision in *Colonial Pipeline Co., this Court noted Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948), where a franchise tax imposed by Mis-

sissippi was sustained on a foreign pipeline corporation which was engaged exclusively in an interstate business, engaged in no intrastate commerce, and had only one customer in Mississippi. 421 U.S. at 109-10. If franchise taxes such as Louisiana's and Mississippi's could be upheld when imposed on corporations doing exclusively interstate business in those states, then undoubtedly the Texas franchise tax does not violate the Commerce Clause.

In *Complete Auto Transit, Inc. v. Brady, supra*, this Court asserted:

> [These] decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with *a sustantial nexus with the taxing State, is fairly apportioned*, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. 430 U.S. at 279. (Emphasis added).

Respondents contend that not only did Petitioners' sales have a substantial nexus with Texas, they had a total and exclusive nexus with this state. Cf. *El Paso Electric Company v. Calvert*, 385 S.W.2d 542 (Tex. Civ. App. — Austin 1965, writ ref'd n.r.e.), *appeal dismissed*, 382 U.S. 18 (1965). Like Petitioners herein, the taxpayer in *Complete Auto Transit, Inc.*, ignored its intrastate activity and argued that its transportation activities in Mississippi were but a part of interstate movement, and that, therefore, any taxes assessed on such business were unconstitutional as applied to operations in interstate commerce. 430 U.S. at 277-78. However, as this Court observed, this argument, gleaned from *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), bears "no relationship to economic realities," 430 U.S. at 279, and "reflects an underlying philosophy

that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278. As this Court wrote in *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 154 (1937):

> From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character.

Consistent with its decision in *Complete Auto Transit, Inc.*, this Court decreed in *Washington Revenue Dept.*:

> [As] was recognized in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), interstate commerce must bear its fair share of the state tax burden. The Court has repeatedly sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State. . .
>
> Respondents proved no facts in the Superior Court that, under the above test, would justify invalidation of the Washington tax. The record contains nothing that minimizes the obvious nexus between Washington and Respondents; indeed, *respondents conduct their entire stevedoring operations within the State. Nor have respondents successfully attacked the apportionment of the Washington system.*. . . . 435 U.S. at 750. (Emphasis added).

No fact was stipulated by the parties in this cause that evidences anything but the exclusive nexus between Texas and Petitioners' sales.

Moreover, Petitioners have overlooked the fact that Article 12.02(1)(b)(i) is itself the apportionment statute for the franchise tax. Cf. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). Article 12.02(1)(b)(i) determines which sales will go into the numerator of the allocation formula set out in Article 12.02(1)(a). Those sales not falling within Art. 12.02(1)(b)(i) go into the denominator of Art. 1202(1)(a)'s allocation formula. Petitioners' gross receipts are not from business done in any other state because the sales occurred in Texas, and thus, consistent with Article 12.02(1)(b)(i), are "gross receipts from business done in Texas."

Petitioners focus on the resale of the natural gas by other sellers in other states in their attempts to show multiple taxation. (Petition for Writ of Certiorari, p. 16). These resales are irrelevant, however, to the measurement of Petitioners' franchise tax. These resales are made by Petitioners' *buyers* and thus would have no bearing on the calculation of Petitioners' franchise taxes. Also, as noted in *Texas Eastern Transmission v. Kingsley, supra*, "Most important, however, is the fact that these receipts were not allocated to any other state for purposes of computing that state's franchise tax." (Tr., Vol. II, 283). The Court in *Texas Eastern Transmission* further noted: "The fact that no other state utilized these receipts to compute its franchise tax allocation factor assured Texas Eastern of not being subjected to a multiple burden." (Tr., Vol. II, 298). Whereas Petitioners' purchasers might be taxed in other states for sales of gas they made in those states, Petitioners simply can point to no other state which taxed *them* on the sales at issue. Additionally, Petitioners offer this Court no plan or idea as to how their sales which occur wholly and exclusively in Texas could be fairly apportioned in a manner contrary to that sustained by the Court of Civil Appeals' decision. As this Court held in *Moorman Mfg. Co.*,

> [The] States have wide latitude in the selection of apportionment formulas and . . . a formula produced assessment will only be disturbed *when the taxpayer has proved by 'clear and cogent evidence'* that the income attributed to the State is in fact 'out of all appropriate proportion to the business transcted . . . in that State,' . . . or has 'led to a grossly distorted result,' . . . 437 U.S. at 274. (Emphasis added).

It should come as no surprise that Petitioners offered no clear and cogent evidence to show that use of their Texas sales of natural gas to measure their franchise taxes grossly distorted their true tax liability or that these Texas sales led to a misapportionment of their business transacted in Texas.

Finally, citing *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 334-35, 60 S.Ct. 273, 275 (1939), an earlier Texas franchise tax case, this Court in *Commonwealth Edison Company opined:*

> There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce: *particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.'* 101 S.Ct. at 2957. (Emphasis added).

In *Ford Motor Co.*, this Court wrote:

> When that charge, as here, is based upon the

> proportion of the capital employed in Texas, *calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violataed.* 331 U.S. at 334-5. (Emphasis added).

With Petitioners' franchise tax also having been calculated by their percentage of sales which are within the State, then consistent with *Ford Motor Co.*, "no provision of the Federal Constitution is violated."

III. THE INTERPRETATION OF ARTICLE 12.02(1)(b)(i) BY RESPONDENTS AND THE COURT OF CIVIL APPEALS AFFORDS PETITIONERS AND ALL CORPORATIONS DOING BUSINESS IN TEXAS EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

Petitioners' arguments that suggest that they have been denied equal protection under the Fourteenth Amendment would, in effect, work a denial of equal protection of the laws for corporations other than natural gas companies. In effect Petitioners seek to convince this Court that they are entitled to be afforded more than the equal protection of the laws. Petitioners desire to be given preferential treatment or advantage over other members of the class of corporations included in Article 12.01, *et seq.*, Tax—Gen., Title 122A, V.T.C.S., the Texas Franchise Tax Act, by having their sales with deliveries to purchasers in Texas excluded from the class of "gross receipts from business done in Texas."

The Court of Civil Appeals' affirmation of the inclusion of the subject sales as "Texas gross receipts" under Art. 12.02(1)(b)(i) advances and supports the principles of equal protection, equal rights, and due process. Article 12.02(1)(a) does not permit any distinction between

corporations such as Petitioners and all other corporations doing business in Texas. Article 12.02(1)(a) simply and emphatically provides: "Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas . . ." Under the trial court's judgment, Petitioners would not have to determine the full portion of their entire taxable capital taxable by the state because a great amount of their "Texas gross receipts" under Art. 12.02(1)(b)(i) would be erroneously excluded from the numerator of the allocation formula under Art. 12.02(1)(a).

The court in *Grayson County State Bank v. Calvert*, 357 S.W.2d 160 (Tex. Civ. App. — Austin 1962, writ ref'd n.r.e.) noted:

> The Constitution requires that tax legislation may classify persons and items for purposes of taxation and are satisfied when such legislation meets two tests: (1) Is the Classification of the tax reasonable? and (2) Within the Class, does the legislation operate equally?
>
> The class created by Chapter 12, Title 122A, V.A.C.S., is composed of *all domestic and foreign corporations chartered or authorized to do business in Texas . . . Id.* at 162. (Emphasis added).

See also, Continental Bus System v. Carney, 310 S.W.2d 676, 677 (Tex. Civ. App. — Austin 1958, writ ref'd), where the Court more aggressively described the franchise tax as follows: "This tax is imposed on *all corporations* as such and *without regard to the kind of business or the purpose of such corporations.*" (Emphasis added). Instead of applying this rule of law from *Continental Bus System*, the trial court ignored it and gave undue regard to Petitioners' "kind of business."

Petitioners realize that they cannot establish their own class of natural gas corporations for purposes of the franchise tax statutes so they attempt to show unequal protection by citing Respondent Comptroller's Rule .026.02.12.013 which states in part:

> (c) Transactions not resulting in Texas gross receipts.
>
> (1) Revenue from ticket sales in Texas for air travel to foreign countries or other states does not constitute Texas receipts.

In referring the Court to this Rule, Petitioners are comparing apples with oranges. In the first place, common sense reveals that revenue from the sale of tickets for air travel to foreign countries or other states would be revenue from services performed outside of Texas. In the second place, such revenue would be measured as a Texas or non-Texas gross receipt, not under Art. 12.02(1)(b)(i), but under Art. 12.02(1)(b)(ii): "Services performed within Texas." (See Petition for Writ of Certiorari, p.3). In the air travel example, sale of the ticket in Texas is not analogous to Petitioners' sales of natural gas in Texas. The buyer of the airplane ticket is not paying for the ticket, but for the service (air travel) which it represents, and such service is to be performed *outside* the state.

Petitioners cite subsection (c)(3) of the same Comptroller's Rule which states:

> The sale of oil, goods or merchandise delivered to a third party carrier for delivery outside the State of Texas does not constitute business done in Texas, regardless of F.O.B. destination, unless it is established that the oil, goods or merchandise were delivered to a purchaser in Texas.

This regulation in no way denies Petitioners the equal protection of the laws. Comparision of this rule to Art. 12.02(1)(b)(i) readily shows that the rule merely follows the statute's language.

Application of this Court's holding in *State of Maryland v. State of Louisiana, supra,* to Respondents' inclusion of Petitioners' subject sales as "Texas gross receipts" under Art. 12.02(1)(b)(i) demonstrates that there is no discrimination against interstate commerce involved herein. In further declaring that the Louisiana tax violated the Commerce Clause of the United States Constitution, this Court was very concerned with Louisiana's discrimination against interstate commerce. 101 S.Ct. at 2135. It was concluded:

> As we have said, OCS gas may generally be consumed in Louisiana without the burden of the First-Use Tax. Its principal application is to gas moving out of the State. Of course, it does equalize the tax burdens on OCS gas leaving the State and Louisiana gas going into the interstate market. But this sort of equalization is not the kind of 'compensating' effect that our cases have recognized. . .
>
> Accordingly, we grant plaintiffs' exception that the First-Use Tax is unconstitutional under the Commerce Clause because it unfairly discriminates against purchasers of gas moving through Louisiana in interstate commerce. *Id.* at 2136.

In direct contrast to the Louisiana First-Use Tax, Art. 12.01, *et seq.,* and especially Art. 12.02(1)(b)(i), do not discriminate against interstate commerce. All corporations doing business in Texas, whether foreign or domestic and whether interstate or intrastate in their nature of operations, have their franchise tax measured in the same manner by Articles 12.02(1)(a) and (b).

As expected, Petitioners argue that they are being denied equal protection because of a stipulation entered between Texaco, Inc. and the State of Texas. (Tr., Vol. I, 165 and Tr., Vol. II, 253). In this stipulation, Texaco's gross receipts from sales of gas to interstate pipelines in Texas were incorrectly excluded from "gross receipts from business done in Texas" under Art. 12.02(1)(b)(i). The stipulation was entered March 14, 1974 (Tr., Vol., 159), prior to the issuance of Opinion No. H-640 which properly interpreted Art. 12.02(1)(b)(i). In using this stipulation as support for their arguments, Petitioners again overlook the fact that they ask for special judicial treatment for a separate class of corporations not specifically exempted from the provisions of Art. 12.02(1)(b)(i).

Respondents regret the Texaco stipulation of March 14, 1974 and the Marathon Oil Company's refund of May 18, 1974 (Tr. 471). However, such a stipulation and grant of a refund were made prior to the issuance of Attorney General Opinion No. H-640 which alerted Respondents to the proper application of Art. 12.02(1)(b)(i). It is true that Texaco and Marathon received special treatment in direct contravention of Art. 12.02(1)(b)(i). However, the answer to this preferential treatment received by the two corporations is, not the perpetuation of this unlawful special treatment for corporations in the natural gas business as Petitioners would desire, but the inclusion of Petitioners and all other corporations in the same class where all corporate sales with deliveries of products to purchasers in Texas will lead to Texas gross receipts under Art. 12.02(1)(b)(i). Other than these Texaco and Marathon instances, Petitioners have cited *no instance* where Respondent Comptroller of Public Accounts has failed to uniformly apply Art. 12.02(1)(b)(i) to sales such as Petitioners' which are transacted exclusively in Texas. In *Com. v. Westinghouse Elec. Corp.*, 386 A.2d 491 (Pa. 1978), *appeal dismissed*, 439 U.S. 805 (1978), the Court directly held

that out-of-court settlements entered with other companies cannot prejudice the right of the State to the full amount of taxes due, especially where the out-of-court settlements were due to errors made by the taxing authority. The Court further held that there is no equal protection violation in such circumstances. *Id.* at 493-4. Any other result would fail to afford similar treatment to all corporations.

Petitioners have in effect sought special treatment as corporations doing business in "interstate commerce" merely because the gas they sell is dedicated to interstate commerce or their sales are in interstate commerce for purposes of the Natural Gas Act. However, this Court does not endeavor to engage in analysis of interstate commerce questions based upon labels which ignore the practical effects of a tax. Citing *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 105, 95 S.Ct. 1538, 1543 (1975), this Court concluded in *Commonwealth Edison Company v. Montana, supra:*

> To accept appellants apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' 101 S.Ct. at 2957.

CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ENSERCH EXPLORATION, INC., and
CONTINENTAL OIL COMPANY,
Petitioners

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents

* * *

PROOF OF SERVICE

I hereby certify that on this 15 day of January, 1982, three copies of Respondents' Brief in Opposition were mailed, postage prepaid to Mrs. Mary Joe Carroll, P. O. Box 1148, Austin, Texas 78767, counsel for Petitioners.

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